

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
<b>Phoenix Broadcasting Group, Inc.</b>	)	Facility ID No. 24666
	)	NAL/Acct. No. MB20041810086
	)	File No. BRH-20040130BRT
Licensee of Station KAMJ(FM)	)	FRN: 0005941414
Gosnell, Arkansas	)	
	)	
Licensee of Station KQXF(FM)	)	Facility ID No. 52904
Osceola, Arkansas	)	NAL/Acct. No. MB20041810085
	)	File No. BRH-20040130BRN
	)	FRN: 0005941414
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: April 14, 2011**

**Released: April 15, 2011**

By the Chief, Audio Division, Media Bureau:

**I. INTRODUCTION**

1. The Audio Division has before it two Petitions for Reconsideration (“Petitions”) filed on August 14, 2008, by Phoenix Broadcasting Group, Inc. (“Phoenix”), licensee of Station KAMJ(FM), Gosnell, Arkansas, and Station KQXF(FM), Osceola, Arkansas (“Stations”). The Petitions ask for reconsideration of two July 15, 2008, decisions to issue monetary forfeitures (“Forfeiture Orders”),<sup>1</sup> each in the amount of nine thousand dollars (\$9,000), for Phoenix’s willful and repeated violation of Section 73.3526 of the Commission’s Rules (“Rules”)<sup>2</sup> by failing to properly maintain a public file for each of the Stations. For the reasons discussed below, we deny the Petitions.

**II. BACKGROUND**

2. On January 30, 2004, Phoenix filed applications to renew the respective licenses of both Stations. Section III, Item 3 of the license renewal application form, FCC Form 303-S, requests that the licensee certify that the documentation required by Section 73.3526 or 73.3527 of the Rules, as applicable, has been placed in the station’s public inspection file at the appropriate times. In its renewal application for KAMJ(FM), Phoenix indicated “No” to that certification, filing an amended Exhibit explaining that the following issues/programs lists were not in KAMJ(FM)’s public files: in 1999, quarters one through four; in 2000, quarters two and three; in 2001, quarters two and four; in 2002, quarters two and four; and in 2003, the second quarter. In its renewal application for KQXF(FM), Phoenix explained that the following issues/program lists were also not in KQXF(FM)’s public files: in 1999, quarters two through four; in 2000, quarters one through three; in 2001, quarters one, two and four;

<sup>1</sup> See *Phoenix Services, Inc.*, Forfeiture Order, 23 FCC Rcd 10935 (MB 2008)(Station KQXF(FM)); *Phoenix Services, Inc.*, Forfeiture Order, 23 FCC Rcd 10927 (MB 2008)(Station KAMJ(FM)).

<sup>2</sup> 47 C.F.R. § 73.3526.

in 2002, quarters one through four; and in 2003, quarters one through three. On September 10, 2004, the staff advised Phoenix of its apparent liability (“NAL”)<sup>3</sup> for a forfeiture of \$9,000 per station for willfully and repeatedly violating Section 73.3526 of the Rules, based on the fact that, by its admission, eleven issues/programs lists were missing from the public inspection files of Station KAMJ(FM), and sixteen such lists were also missing from the files of Station KQXF(FM) between 1999 and 2003. In response, Phoenix filed requests for cancellation of each of the proposed forfeitures (“Requests”) on January 7, 2005. The Commission rejected these Requests in the Forfeiture Orders. Phoenix then filed the subject Petitions.

3. In its Petitions, which are largely identical, Phoenix repeats several arguments considered and rejected in the NAL, notably that the violations were neither willful<sup>4</sup> nor repeated.<sup>5</sup> Further, Phoenix argues that the forfeiture amounts issued in these cases are inconsistent with forfeiture orders issued in similar or more egregious cases.<sup>6</sup> Finally, Phoenix argues for the first time that the Commission failed to comply with the Small Business Regulatory Enforcement and Fairness Act of 1996 (“SBREFA”).<sup>7</sup>

### III. DISCUSSION

4. The Commission will consider a Petition for Reconsideration only when petitioner shows either a material error in the Commission’s original order or raises changed circumstances or unknown additional facts not known or existing at the time of petitioner’s last opportunity to present such matters.<sup>8</sup> Phoenix has failed to meet this burden.

5. Phoenix first appears to suggest that, absent supporting federal precedent, the Commission may not enforce its “unsupportable view” that violations resulting from inadvertent error are “willful” violations of the Rules.<sup>9</sup> We disagree. The Commission is entitled to rely on its own published precedent.<sup>10</sup> We thus find that the Forfeiture Orders properly relied on Commission precedent in finding that violations resulting from inadvertent error or failure to become familiar with the Commission’s requirements are willful violations.<sup>11</sup> Accordingly, we find these arguments to be meritless.

<sup>3</sup> Letter to Gary S. Smithwick, Esq. from Peter Doyle, reference 1800B3-KV (MB Sep. 10, 2004).

<sup>4</sup> See KAMJ(FM) Petition at 5-6; KQXF(FM) Petition at 5-6.

<sup>5</sup> *Id.* at 6-7.

<sup>6</sup> *Id.* at 7-8.

<sup>7</sup> See KAMJ(FM) Petition at 9-10 and KQXF(FM) Petition at 8-9, each citing Pub. L. No. 104-121, § 223, 110 Stat. 847, 862 (1996), 5 U.S.C. § 601 Note.

<sup>8</sup> See 47 C.F.R. § 1.106, *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff’d sum nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966); *National Association of Broadcasters*, Memorandum Opinion and Order, 18 FCC Rcd 24414, 24415 (2003).

<sup>9</sup> KAMJ(FM) Petition at 5-6; KQXF(FM) Petition at 5-6. Phoenix further cites *CBS Corp. v. FCC*, 535 F.3d 167 (3d Cir. 2008) in questioning the validity of the Commission’s consistent interpretations of the statutory “willfulness” standard in Section 312(f)(1) of the Act. The Supreme Court, however, vacated *CBS Corp.* on May 4, 2009, and remanded the case to the Third Circuit Court of Appeals. 129 S. Ct. 2176 (2009). The opinion, therefore, carries no persuasive value.

<sup>10</sup> 47 C.F.R. § 0.445(e). Pursuant to Section 0.445(e) of the Rules, interpretations designed to have general applicability and legal effect that are published in the FCC Record “may be relied upon, used or cited as precedent by the Commission” in any manner.

<sup>11</sup> See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992) (stating that “inadvertence ... is at best, ignorance of the law, which the Commission does not consider a mitigating circumstance”).

6. Without citing any legal authority, Phoenix next argues that its public file violations were not repeated. This argument was considered and rejected in the NAL. As Phoenix does not raise any new information reflecting changed circumstances, does not present additional facts not known at the time of its Requests, and does not attempt to show anything more than a disagreement with the Commission's original order concerning this point, we reject without further consideration this unsupported and repetitious argument.

7. Phoenix also argues that the forfeiture amount, for what it refers to in each case as a "minor mistake" and "inadvertent omission," is unreasonable and unjust when compared to the decision in *Logos Broadcasting Corp.*,<sup>12</sup> in which the Commission admonished a licensee for making false certifications in violation of Section 1.17 of the Rules. Phoenix, however, neglects to mention the reason for the Commission's seemingly light treatment for what we agree is a serious Rule violation – that issuance of a forfeiture was barred by the statute of limitations.<sup>13</sup> As such, the decision in *Logos* carries no persuasive weight.

8. Next, Phoenix again argues that the forfeiture amounts are inconsistent with several Media Bureau decisions involving public file violations in which we assessed a \$3,000 forfeiture.<sup>14</sup> Again, we disagree. As an initial matter, as stated in the NALs, the *Mel Wheeler Cases* involved a forfeiture of \$3,000 for the licensee's public file Rule violations, where the public files in each case were missing a total of three issues/programs lists. By contrast, Phoenix's public files were missing sixteen issues/programs lists for Station KQXF(FM) and eleven issues/programs lists for Station KAMJ(FM). We therefore find these cases distinguishable and unpersuasive. The other cases cited by Phoenix are also distinguishable from the instant case. In *Towson*, for instance, the Bureau acknowledged that the \$3,000 amount assessed was inconsistent with prevailing precedent.<sup>15</sup> *Bay Broadcasting* is also distinguishable because, unlike here, the violations there continued "for an indiscernible period of time."<sup>16</sup> Finally, the *Capstar* case is distinguishable because, while certain quarterly issues/programs lists were missing, the station managers did keep "letters of thanks" regarding station support of community events and awareness campaigns.<sup>17</sup> Conversely, there is ample precedent to support the issuance of a \$9,000 forfeiture per station in this case.<sup>18</sup>

<sup>12</sup> *Letter to Dan Alpert, Esq.*, 23 FCC Rcd 10202 (MB June 30, 2008).

<sup>13</sup> *Id.*

<sup>14</sup> See KAMJ(FM) Petition at 8; KQXF(FM) Petition at 8, citing *Mel Wheeler, Inc.*, Letter, 18 FCC Rcd 20215 (MB 2003)(issuing a forfeiture of \$3,000 for the licensee's public file Rule violations, where the public files were missing a total of three issues/program lists); *Mel Wheeler, Inc.*, Letter, 18 FCC Rcd 20211 (MB 2003)(same)(collectively, "*Mel Wheeler Cases*"); *Capstar TX Limited Partnership*, Letter, 18 FCC Rcd 20195 (MB 2003)("*Capstar*")(issuing a forfeiture for \$3,000 for keeping "letters of thanks" regarding station support of community events and awareness campaigns rather than quarterly radio issues/programs lists); *Bay Broadcasting Corp.*, Letter, 18 FCC Rcd 20207 (MB 2003)("*Bay Broadcasting*")(issuing a forfeiture of \$3,000 for keeping incomplete issues/programs lists in its public inspection file); and *Towson University*, Letter, 18 FCC Rcd 20223 (MB 2003)("*Towson*")(issuing a forfeiture of \$3,000 for not updating its quarterly issues/programs lists in a timely fashion).

<sup>15</sup> *Towson University*, Forfeiture Order, 23 FCC Rcd 8747 (MB 2008) (declining to reduce the forfeiture amount, noting that the \$3,000 forfeiture issued in the NAL for ten missing issues/programs lists was inconsistent with precedent).

<sup>16</sup> *Bay Broadcasting*, 18 FCC Rcd at 20208.

<sup>17</sup> *Capstar*, 18 FCC Rcd at 20195.

<sup>18</sup> See *Faith Baptist Church, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 22 FCC Rcd 9146 (MB 2007) (\$10,000 forfeiture issued for eleven missing issues/programs lists); *Geneva Broadcasting, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 10642 (MB 2006) (same); *South Atlanta Broadcasting, Inc.* Memorandum Opinion and Order and Notice of (continued....)

9. Lastly, Phoenix argues for the first time that the Commission has not complied with its obligations under SBREFA. Phoenix argues that until the Commission adopts a policy or program for reducing or waiving civil penalties for violations by small entities, the Commission lacks the legal authority to impose penalties on small entities, such as Phoenix.<sup>19</sup> We disagree with this argument. When the Commission adopted the forfeiture guidelines, it expressly held that they comply with Section 223 of SBREFA because they provide for reduction or waiver of forfeitures imposed on small entities pursuant to its specified downward adjustment factors.<sup>20</sup>

### III. CONCLUSION

10. Accordingly, for the reasons discussed above, IT IS ORDERED, that the Petitions for Reconsideration filed by Phoenix Broadcasting Group, Inc., on August 14, 2008, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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Apparent Liability, 21 FCC Rcd 8471 (MB 2006) (\$10,000 forfeiture assessed for nine missing issues/programs lists); *Emerson College*, Memorandum Opinion and Order and Notice of Apparent Liability, 21 FCC Rcd 8488 (MB 2006)(\$10,000 forfeiture assessed for fifteen missing issues/programs lists).

<sup>19</sup> KAMJ(FM) Petition at 9; KQXF(FM) Petition at 9.

<sup>20</sup> *Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17109, ¶¶ 51, 52 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).